IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1884.

No. 735.

THE CHEROKEE NATION *vs.* THE UNITED STATES (CONGRESS)

vs.

MOSES WHITMIRE, TRUSTEE FOR THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

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OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

Statement of the Case.

This is an appeal from a supplemental decree of the Court of Claims directing the enforcement of a final decree of the same court passed some fourteen years earlier, which was a consent decree, and from which no appeal was taken.

The circumstances leading up to the litigation and the history of the litigation itself are, briefly stated, as follows:

In

On July 19, 1866, the United States and the Cherokee Nation entered into a treaty which was promulgated August 11, 1866 (14 Stat. L., 798), the 9th article of which provided: .

> "That all freedmen [of the Cherokee Nation] who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native-born Cherokees."

By the 15th article of said treaty it was also provided that:

> "The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States," etc., etc.

And by the 20th article of said treaty it was also provided that:

> "Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States."

Following this treaty, and in consequence of it, the Cherokees amended their constitution, so that it was provided by section 2 thereof (Rec., p. 27) that:

> "The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20 of the treaty of the 19th of July, 1866, between the United States and the Cherokee Nation."

And it was provided by section 5 thereof that:

> * * * "All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now resident therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation" (Rec., p. 27).

On the 8th day of April, 1867, the Cherokees and the Delawares, with the approval of the President of the United States, entered into a treaty by which the Cherokees sold to the Delawares—

> "for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elected to remove to the 'Indian country,' * * * and in case the Cherokee lands shall hereafter be allotted among the members of the Nation, it is agreed that the aggregate amount of land herein provided for the Delawares to include their improvements according to the legal subdivisions when surveys are made (that is to say 160 acres for each individual) shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation. * * * On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds as native-born citizens, save as hereinbefore provided. * * * And the children hereafter born of such Delawares, so incorporated in the Cherokee Nation, shall in all respects be regarded as native Cherokees."
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> Delawares *vs.* Cherokees, 193 U. S., pp. 129, 130, 132; 28th C. C. R., 287.

On the 7th day of June, 1869, the Cherokees entered into a similar treaty with the Shawnees, by which the latter Indians became incorporated in the Cherokee Nation, the essential difference between their case and that of the Delawares being that they paid into the treasury of the Cherokees a lump sum and did not receive any guarantee as to the use, occupancy, and allotment of any particular lands (Blackfeather's case, 155 U. S., p. 218).

That these arrangements converted the freedmen, Delawares, and Shawnees into citizens of the Nation has never been questioned, but the idea had long existed among the Cherokees that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in the common property (Rec., p. 30).

There was, however, no immediate occasion for the assertion of this idea, and for more than a decade the freedmen, Delawares, and Shawnees were accepted and recognized by the Cherokees as Cherokee citizens without any more specific definition of their rights.

By the act of March 3, 1883 (22 Stat. L., p. 603, chap. 143), Congress appropriated to the Cherokee Nation $300,000.00 in payment for some of its lands, and thereafter up to about the year 1890 various sums came into the treasury of the Cherokee Nation from the lease of grazing lands, etc., and as these sums were to be distributed per capita among the Cherokee citizens, the idea was advanced by Cherokees of the blood that they alone were entitled to participate in this distribution. In accordance with this idea the national council, by an act approved April 27, 1886, provided:

> "That the phrase 'all rights of native Cherokees,' as used in the 9th and 15th articles of the treaty of July 19, 1866, between the United States and this Nation, is hereby construed to mean the individual rights, privileges and benefits enjoyed by white adopted citizens of this Nation before and at the making of said treaty, and who had been by law admitted to 'all the rights of a native Cherokee, civil, political,

> and personal,' as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain or to the proceeds thereof," etc., etc. (Rec., p. 30).

And following the principle declared by this legislation the Nation distributed its funds per capita among the Cherokees of the blood to the exclusion of the freedmen, Delawares, and Shawnees.

By act of October 19, 1888 (25 Stat. L., 609, chap. 1211), Congress appropriated $75,000.00 to be distributed by the Secretary of the Interior among the freedmen, Delawares, and Shawnees, for the purpose of equalizing them with the per capita payments previously made by the Cherokee Nation to Cherokee citizens of the blood, said sum to be a lien on the Cherokee lands west of the Arkansas river. And in carrying out the terms of this appropriation the Secretary of the Interior had a roll of the freedmen of the Cherokee Nation made, as of March 3, 1883 (Rec., p. 63), which is known in the record and in this brief as the "Wallace roll." As a basis for the beginning of this Wallace roll the Cherokee Nation had furnished the Secretary of the Interior a census roll of the freedmen taken by the Nation in 1880, which is known in the record and in this brief as the "Authenticated Cherokee roll."

Jurisdictional Act of 1890.

This recognition by Congress of the rights of the freedmen, Delawares, and Shawnees, and this distribution of $75,000 among them, failed to settle the controversy, and Congress, by act of October 1, 1890 (26 Stat. L., p. 636, chap. 1249; Rec., p. 14), conferred upon the Court of Claims full jurisdiction—

> "to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, * * * and also of the Cherokee freedmen,

who are settled and located in the Cherokee Nation under the provisions and stipulations of article 9 of the aforesaid treaty of 1866, in respect to the subject-matter herein provided for.

"SEC. 2. That the said Shawnees, Delawares and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing or rent for grazing purposes on Cherokee lands west of 96 degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, *and for all moneys, lands and rights* which shall appear to be due to the said Shawnees, Delawares or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

"SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf, and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior," etc., etc.

The parties thus enabled elected to bring separate suits, and the Delawares brought their suit in the name of their principal chief, Charles Journeycake; the Shawnees in the name of their principal chief, Johnson Blackfeather, and the freedmen in the name of their duly selected and approved trustee, Moses Whitmire.

In this petition Whitmire prayed for a decree—

> "establishing the said proportionate right, interest, title, and share of said freedmen of the Cherokee Nation in the said lands now known as the Cherokee Reservation, and in the said lands now known as the Cherokee Outlet, and that the said freedmen of the Cherokee Nation may be found and decreed to be seized of and to have and enjoy proportionate rights, interests, titles, and shares in all of the said last-named lands, known as the Cherokee Reservation and the said Cherokee Outlet, and the interests of the Cherokee Nation therein" (Rec., p. 7).

with additional prayers that the freedmen be allowed to participate in the funds of the Nation, whether theretofore paid out to their exclusion or thereafter to be paid. And the prayers of the Delawares and Shawnees in their petitions were similar in their scope and purpose.

On the 12th day of June, 1893, the Court of Claims passed its decrees in the Journeycake and Blackfeather cases, granting the same relief in each case, and the following is an extract from the decree in the Journeycake case (28 C. Cls. R., 320):

> "And it is further adjudged and decreed that the claimants in this suit and those whom they represent, being citizens of the Cherokee Nation, of Delaware blood or parentage, be adjudged and decreed to be entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain, or common property of the Nation among the citizens thereof, by distribution per capita at any time hereafter, the defendants the Cherokee Nation, and the defendants the United States as trustees of the Cherokee Nation, be enjoined and prohibited from making any discrimination between Cherokee citizens of Cherokee blood or parentage and Cherokee citizens of Delaware blood or parentage, to the injury or prejudice of the latter."

And in addition these decrees provided for the immediate payment to Delaware and Shawnee citizens per capita of sums sufficient to equalize them with the per capita payments previously made by the Cherokee Nation to Cherokee citizens of the blood.

These cases were appealed to this court, and on the 19th day of November, 1894, this court affirmed in each case the decree of the court below (Journeycake's case, 155 U. S., p. 196, and Blackfeather's case, *id.*, p. 218).

It may be well to explain here that that portion of the Cherokee lands lying east of 96 degrees and occupied by the Nation is referred to in the record as the "Cherokee Reservation." Certain lands lying west of 96 degrees and belonging to the Nation are known as the "Cherokee Outlet."

Pending the final adjudication of these cases, the Cherokee Nation sold to the United States the lands remaining to them in the Cherokee Outlet (act of March, 1893, 27 Stat. L., 612, chap. 209) for the sum of $8,595,736.00, with the proviso that a sufficient amount of money should remain in the Treasury of the United States until the status of the Delawares, Shawnees, and freedmen should be determined by the courts before which their suits were then pending (Rec., p. 37).

On the 3d day of May, 1893, Whitmire, as trustee for the freedmen, filed in the Court of Claims an amended petition, praying that they be allowed to participate in the distribution of this "Cherokee Outlet" money, and, after the mandates of this court had come down to the Court of Claims, Journeycake and Blackfeather filed motions in their cases to have their decrees extended to include this fund, and the court allowed these motions (30 C. Cls. R., 172).

On the 14th day of February, 1895, the Cherokee Nation filed its answer to the original and amended petitions in the Whitmire case, *nunc pro tunc,* as of December 19, 1894 (Rec., p. 24). On the 19th day of December, 1894, the case was submitted to the court, after argument (Rec., p. 27),

and on May 8, 1895, the court rendered a decree finding that the freedmen were entitled to participate in the Cherokee national funds and common property, in the same manner and to the same extent as Cherokees of the blood.

It was further decreed that the roll of such freedmen, known as the Wallace roll, should be taken as showing the number and identity of such freedmen, and the Secretary of the Interior was directed—

> "to cause the 'Wallace roll' aforesaid to be further corrected by adding thereto descendants born since March 3, 1883, and prior to May 3, 1894, striking therefrom the names of those who have died or have ceased to be citizens of the Cherokee Nation between the aforesaid dates, so that when thus amended and changed it shall represent the number of freedmen, free colored persons, and their descendants aforesaid entitled to participation in the distribution of the fund now awarded to the complainant" (30 C. Cls. R., 180).

Neither party was satisfied that the "Wallace roll" was the true list of freedmen and free colored persons entitled to participate in the common property of the Cherokee Nation, the freedmen claiming that it failed to include many of them who were entitled to participate, and the Cherokee Nation insisting that it included persons not entitled to participate, and on June 20, 1895, the Nation and the United States joined in a motion for a rehearing, and also filed an application for an appeal to this court, and on July 23, 1895, the claimant also filed an application for an appeal. On January 30, 1896, the above applications of the defendants and the claimant were withdrawn by leave of the court, and on February 3, 1896, the decree entered May 8, 1895, was, upon the application of all the parties, vacated, and a new decree, to which all the parties had consented, was entered (Rec., p. 36). The language of this decree in defining the

status of the freedmen was identical with that used in the decrees in the Journeycake and Blackfeather cases:

> "That the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid, and their descendants living and in being on the 3rd day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property of the nations among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of such treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter" (Rec., pp. 38-39).

This decree further provided as a substitute for the adoption of the "Wallace roll," as provided in the first decree, that—

> "The Secretary of the Interior be authorized to appoint three Commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons and their descendants, claiming to be entitled to share in the distribution of said $903,365.00 that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be

represented before said Commissioners, either at the taking of the testimony in the Cherokee country or elsewhere; and that the said Commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the 'Authenticated Cherokee roll,' the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880, for the purpose of showing the number of freedmen then entitled to citizenship in the said Nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said Commissioners shall ascertain who of said persons named on said roll were alive, and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said Commission tending to disprove the citizenship of any of the persons whose names appear upon said roll" (Rec., pp. 39-40).

And it was further provided that when the foregoing roll was approved by the Secretary of the Interior, he was, after deducting costs and expenses, to distribute among the freedment thus identified the amount remaining of the fund of $903,365.00, ascertained to be the amount then ready for distribution among the freedmen.

On February 15, 1896, the Secretary of the Interior asked the court for a construction of the decree:

1. As to whether the six months' limitation to return applied to the freedmen as well as the free colored persons; and

2. As to whether the six months' period ran from July 19 or August 11, 1866.

And on February 18, 1896, the court passed an order declaring that the limitation of six months applied both to the freedmen and free colored persons, and that the period extended to February 11, 1867. On February 20, 1896, the Secretary of the Interior appointed William Clifton as his

own selection, and Robert H. Kern, upon the nomination of the freedmen, and William B. Thompson upon the nomination of the Cherokees, Commissioners, as provided in the decree (Rec., p. 61). On July 14, 1896, Mr. Kern presented to the court a petition asking the court to instruct the Commissioners as follows (Rec., p. 44):

> "If it shall appear to said Commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion, either by the owners thereof, or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause, of date July 19, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said Commission from the roll to be prepared by it, but the same shall be placed thereon, as well as the descendants of such."

And on April 15, 1896, this petition was by the court denied.

These Commissioners proceeded to the Cherokee Nation, and about the end of the year 1896 reported a roll of freedmen and free colored persons who were alive and in being on May 3, 1894, and their descendants, entitled to citizenship in the Nation, which is known in the record and in this brief as the Kern-Clifton roll. At their sittings in the Nation, the Nation itself was represented by counsel; the report to the Secretary of the Interior was signed by all three of the Commissioners, making it an unanimous report, and on January 16, 1897, it was approved by the Secretary of the Interior, and thereafter the funds were distributed to the persons whose names were on said roll (Rec., pp. 108-113).

II.

Curtis Act.

While these matters were progressing in the Court of Claims and in this court Congress was engaged in perfecting arrangements for the extinction of the tribal governments of the Five Civilized Tribes and the distribution and partition of their funds and public domain among their citizens. The act of March 3, 1893 (27 Stat. L., 612, chap. 209), provided in section 16 for the appointment of a commission, which is known in the record and in this brief as the Dawes Commission, to negotiate with these tribes for this purpose.

As a result of the work of this Commission, the act of June 28, 1898 (30 Stat. L., 495, chap. 517), was passed little more than a year after the distribution under the Kern-Clifton roll above set out was completed. This act, commonly known as the "Curtis act," provided for allotment by the Dawes Commission of the lands belonging to the Cherokee Nation (among other Indian nations) to the citizens thereof.

By section 11 it was provided that:

* * * * * * *

"When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval:

* * * * * * *

"*Provided further,* That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires."

* * * * * * *

And by section 21 the Commission was directed to make a roll of Cherokee citizens in the following manner:

> "SEC. 21. That in making a roll of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of 1880 (not including freedmen), as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities, who have heretofore made permanent settlement in the Cherokee Nation, whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.
>
> "It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

Further legislation controlling the Dawes Commission were the acts of May 31, 1900 (31 Stat. L., 221, chap. 598), and the acts of July 1, 1902 (32 Stat. L., p. 716, chap. 1375), which did not vary the terms of section 21 of the act of 1898, above set out, in any manner material to this issue. The act of 1902 provided that the roll of citizens of the Cherokee Nation should be made as of September 1, 1902, and that no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen

since the 16th day of December, 1895, should be entitled to enrollment or participation in the distribution of the tribal property.

Early in the year 1900 the Dawes Commission began the work of making the Cherokee roll, as required by section 21 of the Curtis act (Rec., p. 80), and were engaged in this until early in the year 1907.

The act of April 26, 1906 (34 Stat. L., 137, chap. 1876) further directed the Dawes Commission in the matter of their work, and provided that the roll of the Cherokee Nation should be made as of March 4, 1906, instead of September 1, 1902.

As shown above, the Court of Claims had already decided (Rec., p. 44) that persons who had not actually returned to the Nation within six months were not entitled to the benefits of the 9th article of the treaty of July 19, 1866, no matter what excuse they had for their absence.

The Dawes Commission, acting in accordance with the opinion of the Assistant Attorney General for the Interior Department, had placed upon the rolls Charles Foreman, who had not returned within six months because, it was alleged, he had been upon a diplomatic or quasi-diplomatic mission to Washington (Rec., p. 73), and other cases of a similar nature had been acted on or were being considered by the Commission, so that the then counsel for the Cherokee Nation, who is one of the counsel now, drew and procured to be included in the act of April 26, 1906, section 3, which provides that the roll of freedmen shall include—

> "only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants who were actual, personal, *bona fide* residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before Feb. 11, 1867."
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> Rec., p. 230.

The Dawes Commission finally completed a roll of the citizens of the Cherokee Nation, which included a separate roll of the freedmen and free colored persons who were, according to its ruling, entitled to citizenship in the Nation and participation in the distribution of its property, and these rolls were finally approved by the Secretary of the Interior March 4, 1907.

In making up this roll of freedmen and free colored persons, neither the Dawes Commission nor the Secretary of the Interior attempted to make it "in strict compliance with the decree of the Court of Claims."

The last per capita distribution made exclusively to Cherokees of the blood (the Cherokee outlet money) had been by act of their council of May 3, 1894 (Rec., p. 38). The decree determined and declared that—

> "the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid, and their descendants *living and in being on the 3d day of May,* 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled," etc., etc.,
>
> Rec., p. 38.

thus vesting the right in living individuals whose identity could be and was ascertained in the manner further provided by the decree.

In ascertaining the identity of these persons the Commissioners, acting under the decree, were to hear the testimony and determine the claims of all freedmen and free colored persons in the Nation, without regard to any previous enrollment, with the sole limitation that they were to accept—

> "the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880,

for the purpose of showing the number of freedmen then entitled to citizenship in the said Nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said Commissioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons *were alive on May* 3, 1894, and no evidence shall be accepted by said Commission tending to disprove the citizenship of any of the persons whose names appear upon said roll."

Rec., p. 40.

On May 11, 1900, the Secretary of the Interior sent to the "Dawes Commission" a letter of instructions concerning this decree, in which he said:

"A roll was made under this decree, known as the 'Clifton roll,' which was approved by this Department in 1897. It has been claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct that a new one be made in strict compliance with said decree is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your Commission is to prepare.

"The roll of 1880, made by the Cherokee Nation, is to be accepted by you as conclusive of the right of all persons whose names are found thereon and of their descendants to be enrolled by you. Your only duty in relation thereto is to ascertain who of the persons named therein are alive and who of their descendants are alive, and place their names on your roll, omitting, however, all who have forfeited or abjured their citizenship."

Rec., p. 72.

And thereafter the Dawes Commission carried on an original investigation as to the rights of the various colored people in the Nation and made their own determinations, utterly ignoring the decree of the court and the roll of col-

ored citizens made under it. They excluded more than a third of the persons from the Dawes roll who had been judicially ascertained by the Kern-Clifton Commission to be citizens of the Nation, and they included in the Dawes roll persons who had not been included in the Kern-Clifton roll.

Supplemental Petition.

As soon as this action became public the freedmen of the Cherokee Nation who were enrolled as citizens of the Nation under the decree of February 3, 1896, and who were denied citizenship by the Dawes Commission, held a public meeting at Lenapah for the purpose of asserting their rights under the decree of the Court of Claims of February 3, 1896.

Since the decree their trustee, Moses Whitmire, had died, and they nominated in his stead Jacob B. Wilson, and Wilson applied to the Court of Claims to be appointed trustee and to be permitted to file a supplemental petition praying for the enforcement of the decree of February 3, 1896, so as to include those persons who were on the Kern-Clifton roll and who were omitted from the Dawes roll, in the distribution and allotment of the common property and public domain of the Cherokee Nation, and on April 20, 1908, this application was allowed (Rec., pp. 45-46-47).

Accordingly, on May 8, 1908, the appellees filed their supplemental petition, which, after briefly reciting the facts above set out, prayed the court to decree that the—

> "action of the said Dawes Commission and the Secretary of the Interior whereby the names of said freedmen were excluded from the roll and citizenship of the Cherokee Nation be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustee for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said

Nation, and further enjoining the said defendant, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said homes and improvements, and further enjoining upon the said defendant, the United States acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements."

Rec., p. 52.

Thereafter the Attorney General filed in the Court of Claims a statement of the case by the Interior Department (Rec., p. 192) substantially agreeing with this statement, but concluding with the following denial:

* * * * * * *

"It is probable that most, if not all, of the land held by freedmen claimants who were rejected has been allotted to duly enrolled citizens of the Cherokee Nation. The Secretary of the Interior and the officials under his direction have not 'ousted' freedmen claimants 'from their homes,' nor are they 'now preparing to oust the remainder of said freedmen (claimants) from their said homes.' On the other hand, the Secretary of the Interior long ago instructed the United States Indian agent, who has jurisdiction, under the direction of the Secretary of the Interior, of the matter of placing allottees in the Cherokee Nation in the possession of their allotments (see section 21 of the act of July 1, 1902), to not proceed to remove from land in the Cherokee Nation claimants for enrollment as Cherokee freedmen whose claim for citizenship was, in anywise, pending, nor is any action now being taken by the United States Indian agent to place Cherokee allottees in possession of land now being held by persons who claimed freedmen citizenship in the Cherokee Nation whose enrollment was denied, but who may be parties to, or affected by, this case."

Rec., p. 199.

And later, at the instance of the appellees, the Secretary of the Interior filed in the court a list of freedmen, some 1,800 in number, whose names appear on the Kern-Clifton roll and who are not identified on the final roll of freedmen citizens of the Cherokee Nation approved by the Secretary of the Interior March 4, 1907—that is, the "Dawes roll" (Rec., p. 202)—with the additional statement that none of them had been found by the Dawes Commission to have forfeited or abjured his or her citizenship in the Cherokee Nation after May 3, 1894 (Rec., p. 200).

The Attorney General then filed as evidence for the defendants a mass of papers from the Interior Department contained in this record from pages 53 to 192, both inclusive. From pages 75 to 192 this matter consists entirely of extracts from the annual reports of the Dawes Commission, and individual and class decisions of the Dawes Commission upon the applications of various freedmen to be admitted to the Dawes roll, the materiality of which to this controversy we are not quite able to see, since there is no disagreement as to what course the Dawes Commission actually pursued. The case was finally submitted to the Court of Claims on the supplemental petition, and on February 20, 1911, the court handed down an opinion (Rec., p. 235) and passed a decree in which it was ordered, adjudged, and decreed—

> "that the said decree of this court passed on the third day of February, 1896, be, and the same hereby is, construed to vest in all the persons whose names were placed on the roll made in obedience to said decree, known as the Kern-Clifton roll, and their descendants born after the third day of May, 1894, and before the fourth day of March, 1907, the right of citizenship in the Cherokee Nation," etc.

This decree continued by reciting the names of the persons on the Kern-Clifton roll who were omitted from the Dawes roll, as shown by the records of the Interior Department (Rec., pp. 202-212), and concluded in this language:

"It is therefore further ordered, adjudged, and decreed that the Secretary of the Interior be, and he hereby is, enjoined and directed to place upon the roll of citizens of the Cherokee Nation, authorized and directed by the acts of June 28, 1898, July 1, 1902, and April 26, 1906, the names of as many of the said freedmen and free colored persons and the names of as many of their descendants, born after the 3d day of May, 1894, and before the 4th day of March, 1907, as may have been living on the 3d day of March, 1907.

"It is further ordered, adjudged, and decreed that the Secretary of the Interior be, and he hereby is, enjoined and directed to pay to each of the said persons so placed on the said final roll of citizens of the Cherokee Nation their proportionate share of any monies belonging to the said Nation that may have been, since June 28, 1898, or may hereafter be, distributed per capita, among the citizens of said Nation, and to allot to each of them their proportionate share of the lands of said Nation, and in taking said allotments each of said persons shall have the same rights, immunities, and privileges in the matter of homestead selections and in all other respects as has been or is provided by law for other citizens of said Nation."

Rec., pp. 235-246.

On March 30, 1911, the defendants filed an application for an appeal to this court. On May 15, 1911, they filed a motion to withdraw the application for appeal, which was allowed by the court on the same day, and on the same day they filed a motion for a new trial, which was overruled by the court June 5, 1911 (Rec., p. 247). On June 17, 1911, the defendants filed an application for an appeal to this court "from the decree rendered in the above-entitled cause on the 20th day of February, 1911," and on the same day this application was allowed.

ARGUMENT.

The Purpose and Scope of the Jurisdictional Act of 1890.

The act of October 1, 1890 (Rec., p. 14), was not intended to procure from the Court of Claims and from this court a mere academic statement of principles, but to confer the full jurisdiction of courts of equity to hear, determine, and *enforce* valuable property rights of individuals. It was not intended that the individuals composing the freedmen, Delawares, and Shawnees should recover merely their individual shares of the moneys theretofore paid in exclusion of them, but that they should have a decree insuring their participation, not merely as a class, but as individuals, in any moneys which the Nation "may hereafter pay per capita," and the jurisdiction was not limited to the distribution of moneys but extended as well to the lands of the Nation, the ultimate allotment of which in severalty had long been contemplated, as will be seen by the provision in the 20th article of the treaty of July 19, 1866 (14 Stat., 798). And it was not intended to limit the adjudication to lands west of 96 degrees, but to give to the freedmen, Delawares, and Shawnees a decree for their individual property rights in "all moneys, lands, and rights which shall appear to be due" them. The controversy had never been in respect of political rights, but always in respect of property. It had resisted every administrative and legislative effort to settle it and the time had come to invoke the aid of the courts.

The Cherokee council had passed its act of April 26, 1886, distributing a fund per capita among Cherokees of the blood to the exclusion of freedmen, Delawares, and Shawnees. Congress had met this by its act of October 19, 1888 (25 Stat. L., 609, chap. 1211), appropriating $75,000.00 to be paid to the freedmen, Delawares, and Shawnees per capita, so as to equalize them with the payments made to the Chero-

kees, and had declared this sum to be a lien upon certain Cherokee lands. Of course, the validity of such a lien was still a question open to controversy.

Congress then passed its act of October 1, 1890 (Rec., p. 14), conferring upon the Court of Claims full jurisdiction to adjudicate and enforce all rights of all the parties concerned. But this did not settle the controversy.

Another fund had already come into the treasury of the Nation, and the council, undeterred by the acts of Congress, above cited, passed its act of November 25, 1890 (Rec., p. 38), again distributing the fund per capita to the Cherokees of the blood to the exclusion of the freedmen, Delawares, and Shawnees. And even after the Court of Claims had decided the Delaware and Shawnee cases (Journeycake's case, 28 C. C. R., p. 320), and while the appeals were pending in this court, the "Cherokee outlet" money came into the treasury of the Nation and the council passed its act of May 3, 1894, distributing this also per capita among the Cherokees of the blood to the exclusion of the freedmen, Delawares, and Shawnees (Rec., p. 38).

It is now contended in this case that the jurisdiction of the Court of Claims conferred by the act of October 1, 1890, was intended to be limited to the barren statement of the rights of the freedmen as a class. This, we shall contend, is not correct. First, because the Court of Claims *is a court* with jurisdiction to pass and *enforce* decrees, and not a mere commission to give opinions or recommendations to the heads of executive departments (Gordon's case, 117 U. S., 697; Anderson's case, 9 Wall., 56); and, second, because such a feeble, empty jurisdiction could not have settled the controversy entrusted to the court to be settled. In fact, it was never possible to settle the controversy by anything short of the adjudication of individual rights, and this has been fully shown by the course of the litigation in this case.

The first decree of the court of May 8, 1895, declared the general principle governing the rights of the freedmen and

from B to C. If the Court of Claims had no authority to inquire into the execution of its judgments, it was shorn of a part of the ordinary jurisdiction of a court."

Curtis Act Does Not Take Away the Jurisdiction of the Court of Claims.

But it is now contended in this case that the jurisdiction over this matter conferred on the Court of Claims by the act of October 1, 1890, was repealed by the act of June 28, 1898 (30 Stat. L., 495, chap. 517), and July 1, 1902 (32 Stat. L., 716, chap. 1375), and April 26, 1906 (34 Stat. L., 137, chap. 1876).

The act of 1898 was an act providing for the distribution of the funds and public domain of the Five Civilized Tribes per capita, among their citizens, and for the final dissolution and extinction of the tribal governments.

For this purpose it was necessary that rolls of citizenship of the several tribes be made, and the 21st section of the act provided specifically how these rolls should be made by the Dawes Commission. But a short time before this court and the Court of Claims had decided that the freedmen, Delawares, and Shawnees were citizens of the Cherokee Nation, with all the rights of Cherokees of the blood. The Cherokees had never made any question as to the identity of the individuals composing the Delaware and Shawnee tribes, while in the case of the freedmen this question had been the very storm center of litigation, and with knowledge of this Congress directed the Dawes Commission, in making up the roll of Cherokee citizens, "not including freedmen," to take the last known roll, to wit, the census roll of 1880, as correctly enumerating all the various citizenship of the Cherokee Nation *except the freedmen*. The reasons for excepting the freedmen are apparent. Hardly more than a year had passed since the distribution of nearly a million dollars to the freedmen had been completed under the direction of the Court

of Claims in the Whitmire case. An old and bitter dispute had apparently been finally settled by the intervention of the court and the consent of the parties. Any direction to the Dawes Commission to reopen the question and make a new roll would have started afresh the ancient controversy. The Kern-Clifton Commission had identified about 4,500 freedmen as being the persons entitled to participation under the decree of the court (Rec., p. 113). Many of these were living upon their homesteads, to which they would have a preferential right to allotment whenever allotment was made (Rec., p. 199). It seems to us clear, therefore, that Congress in excepting the freedmen from the general provisions for making a roll of the Cherokees, had the definite purpose to continue to confide their rights to the jurisdiction and protection of the courts, and with these facts in view, it seems to us not hard to understand why Congress should have provided that the Dawes Commission should—

> "make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, 1896."

And this view of the matter is sustained by the declaration of the Committee of Indian Affairs of the House of Representatives, who formulated and reported the Curtis act. The report says:

> "Provision has heretofore been made for the making of rolls of citizenship of the various tribes, but the commission authorized to do the work is of the opinion that to do equal justice to all concerned they should have additional authority, and we believe this measure provides for the settlement of the question of citizenship, so that when the rolls are made the interest of all concerned will have been fully protected and this vexed and important question will be settled forever.
>
> "The Mississippi Choctaws, the Delawares, the freedmen of the various tribes, claim certain rights

> which we do not attempt to settle in this bill, but in it provision is made to protect all interests the courts may find they have."
>
> House of Representatives Report No. 593, 55th Cong., 2d Session.

This statement of the committee must have referred to the freedmen of the Cherokee Nation, because there was at that time no controversy pending in the courts as to any other freedmen in the Five Civilized Tribes.

The Curtis act certainly did not repeal the jurisdiction of the Court of Claims in express terms, and if it operated as a repeal it did so by mere implication, and the implication must be construed out of the direction to the Dawes Commission to make the roll of freedmen "in strict compliance" with the decree of the Court of Claims.

An old and bitter controversy had come into the courts respecting the rights of the individual freedmen to be recognized as members of the Cherokee Nation entitled to participation in the distribution of its common property and public domain.

After nearly six years of patient labor the court had adjudicated about 4,500 freedmen to be entitled to this participation. All the parties concerned had accepted this adjudication as final and had supposed the controversy to be ended. The freedmen had each received his share of the money distributed and was in the quiet possession of his homestead, secured to him by a decree which gave him the right to have it allotted to him whenever the public domain of the Nation should be divided in severalty, and it seems to us clear that the purpose of the Curtis act was to perpetuate and not to destroy these conditions.

If this court shall decide that the Curtis act was designed to repeal the jurisdiction of the Court of Claims, it will decide that these labors of the court and the parties were in vain, and that the freedmen took by the decree of the Court

of Claims no more than a mere opinion binding upon no one as to their property rights in the Nation.

As was said by the opinion in the court below (Rec., p. 231):

> "It is elementary that repeals by implication are not favored. They are never admitted where former directions can stand with the new act, but only where there is positive repugnancy between the two and where both acts cannot be reconciled."
>
> U. S. *vs.* Greathouse, 166 U. S., 601.

And further (Rec., p. 226):

> "It is apparent, then, that an extraordinary mistake was made in the distribution of the large sum of money then due as the result of the action of the commissioners who made up the Kern-Clifton roll, with the administrative approval of that roll by the Secretary of the Interior—the United States, as trustees, and the Cherokee Nation consenting and the court affirming—if now it shall be made to appear that these same distributees cannot be heard to claim enrollment for distributions of money and allotments of land now ready to be made."

And further (Rec., p. 228):

> "Where parties are rightfully entitled to judicial redress and there is confessedly no other jurisdiction into which they can go, the court having the parties before it already, should continue to exercise jurisdiction and should not interpose doubts and artificial refinements to save itself from the responsibility of decision."

The act of July 1, 1902 (32 Stat. L., 716, chap. 1375), did not, so far as this controversy is concerned, vary the terms of the Curtis act. In its 27th section it merely repeated the directions given in the Curtis act for making the rolls.

Purpose of the Act of 1906.

Neither is there any implication of repeal in the 3d section of the act of April 26, 1906 (34 Stat. L., chap. 137, 1876), which provides that the roll of freedmen shall include—

> "only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants who were actual, personal, *bona fide* residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before Feb. 11, 1867."

In enforcing the decree of February 3, 1896, the Kern-Clifton Commission had been in doubt about their right to admit certain persons who had not actually returned because they had been prevented in various ways not in their control, and the language of the decree itself had been such as to raise the question whether freedmen as well as free colored persons were subject to limitation of residence or return and had also left in doubt whether the six months expired January 19, 1867, or February 11, 1867. These doubts had been resolved by the decretal order of the court of February 18, 1896 (Rec., p. 60), and the language of the said section of the act of April 26, 1906, is almost identical with the language of that decretal order.

The 3d section was inserted into the act of 1906 through the efforts of the counsel for the Cherokee Nation, because the Dawes Commission in violation of the decree of this court was placing upon its rolls certain freedmen or free colored persons who were not residents or who did not return within the time prescribed, because for one reason or another they were held to be constructive residents or to have constructively returned (Rec., p. 230). It certainly requires a wide stretch of the imagination to presume that Congress, by the act of 1906 intended to take away the juris-

diction of the court by using language requiring the Dawes Commission to obey the terms of the court's decree and by using the very definitions which had their origin in the decretal order of this court subsequent to and construing the decree of February 3, 1896, using language which defined the rights of freedmen and free colored persons to be the same, and language which fixed the date of the expiration of six months at February 11, 1867, instead of January 19, 1867. And if there could be any sort of doubt about this it seems to us to be fully answered by the proviso to the 18th section of the same act, which is in these words:

> *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Thus it is evident that Congress had not departed from the purpose first adopted. It had confided the rights of these freedmen to the protection of the court and was continuing to rely upon the court to thereafter define and protect them.

The Amendment Proposed to the Curtis Act.

It is also asserted that an amendment proposed to the Curtis act, when it was being considered in the Senate, and rejected by that body, shows the intention of Congress to repeal the jurisdiction of the Court of Claims.

We are not familiar with any canon of construction that permits a rejected amendment to define the purpose of an act of Congress, and should feel inclined to pass this contention without comment if the scope and purpose of the amendment had not been, unwittingly we are sure, but nevertheless earnestly and persistently, misrepresented. An examination of this proposed amendment to the Curtis act (Rec., p. 70) discloses that its purpose was not to confirm the Kern-

Clifton roll—that is to say, to secure obedience to the decree of the Court of Claims by restricting the freedmen to those persons found upon the Kern-Clifton roll, but to open the door to those freedmen who had been found by the Kern-Clifton Commission not to be entitled to citizenship. If the amendment had been accepted by Congress it would have been the duty of the Dawes Commission to place on its rolls not only those names found on the Kern-Clifton roll, which would have been "in strict compliance with the decree of the court," but to add to the Kern-Clifton roll—

> "the names of all persons who applied before the Commission that made the roll of freedmen in said case (Kern-Clifton) and whose names were not placed upon either said roll or the rejected roll of freedmen made by said Commission in said case, if in their (Dawes Commission) judgment, the evidence offered before said Commission to the Five Civilized Tribes justified their being made citizens of the Cherokee Nation in accordance with the provisions of said decree."

If this amendment had been adopted jurisdiction would have been taken away from the Court of Claims because the Dawes Commission, instead of making its roll "in strict compliance with the decree of the court," could have made it to be what, in their judgment, the Court of Claims, with the machinery which it had used, ought to have made it. If this amendment is valuable in the present consideration of the case, its value is to show that it was not the purpose of Congress to take jurisdiction away from the court.

The Second Delaware Case.

It is also contended here that the authority given by the 25th section of the Curtis act to the Delawares to bring a new suit must be taken to indicate the intention of Congress to treat the entire jurisdiction of the Court of Claims under the act of 1890 as exhausted.

For some reason, which cannot now be known, counsel for the Delawares in Journeycake's case confined themselves to asserting the right of all the members of the Delaware tribe in the common property of the Nation, and the decree in that case did not, therefore, extend to the special and peculiar rights which would remain, under the Cherokee-Delaware agreement, in such original or "registered" Delawares as might be surviving when the property should come to be distributed, though the right was recognized in the Journeycake case in the opinions both of this court and of the Court of Claims. It was these special rights that were settled in the second Delaware case (193 U. S., 127), and it seems plain that if they had been asserted they would have been settled in the first case. But since the omission had been made in the first case, further jurisdictional legislation may have been necessary. In the freedmen case, however, we are not asking to have *new* rights defined and established, but to have *old* and established rights enforced, and for this purpose we insist the jurisdiction of this court is unimpaired, and there is nothing in the second Delaware case obnoxious to this contention.

The Dawes Commission Not a Judicial Body.

It is also contended that the Dawes Commission was a judicial and not an administrative or ministerial body, and in support of this contention appellants rely on Buffington's case (not reported, but reprinted in Annual Rep. Com'r Indian Affairs, 1904, part 2, p. 161) and Kimberlin's case (104 Fed., 716).

Buffington's case was instituted by the chief of the Cherokees to compel the Secretary of the Interior to confine the Dawes Commission to the enrollment of those freedmen whose names were on the census or "authenticated roll" of 1880, which would have been in violation of the decree of the Court of Claims. Judge Raymond very properly dis-

missed the bill. His opinion that the jurisdiction of the Court of Claims had ended was *obiter dicta* and not in any way necessary to the decision of the case.

Kimberlin's case seems to be relied on because Judge Sanborn in that case says in his opinion that the Dawes Commission is invested with judicial powers, and we suppose it is to be inferred that if the Dawes Commission was a part of the judiciary of the United States its jurisdiction superseded that of the Court of Claims. The attention of the court is called to a later opinion of Judge Sanborn in Wallace *vs.* Adams (143 Fed., 726), in which he defines the Commission to be a part of the executive branch of the Government. This case was affirmed by this court (204 U. S., 415). Upon this question the court below said in this case (Rec., p. 228):

> "The Dawes Commission was subordinate to the Secretary of the Interior, and was merely one of the agencies given to enable him to perform the duties of his office. The duties of the Secretary were ministerial, inasmuch as he was directed to make up a roll of a slightly different date, but 'in strict compliance with the decree of the Court of Claims.' The subordinate agency relied upon to carry out the Secretary's own ministerial work could not be judicial if his work was merely ministerial, as we think it was."

Goldsby's Case.

It is also contended that since Congress has provided that the action of the Secretary of the Interior in approving the Dawes rolls shall be "final," the court may not disturb it. The Secretary *finally* approved the Dawes rolls without including Goldsby, who thereupon sought by mandamus to compel the Secretary to place his name on the rolls, notwithstanding the fact that they had been *finally* approved. The court below granted the prayers of the petition and

ordered the Secretary to enroll Goldsby, and this judgment was affirmed by this court (Garfield *vs.* Goldsby, 211 U. S., 249). In the opinion Mr. Justice Day used this significant language:

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."
>
> See also Turner *vs.* Fisher, present term.

Our answer to the contention of counsel is found in this opinion. The Secretary of the Interior and the Dawes Commission were directed by the 21st section of the act of 1898 to obey the decree of the court. Their refusal to do so was the exercise of "arbitrary and unwarranted" power, and it was not only within the power of the Court of Claims "to restore the status of the parties aggrieved," but it was its imperative duty to do so.

Conclusion.

It therefore seems clear to us that when Congress sent this controversy to the Court of Claims it was for the purpose of having every possible phase of it settled in accordance with established principles of justice, and for that purpose it conferred upon the court the full powers of a court of equity.

It is not easy for us to conceive or we think possible to find in the Curtis or any subsequent act or acts a congressional purpose to nullify and set aside this jurisdiction and destroy almost as soon as it was finished the great work of the court. We do not believe that it was intended by the "Curtis act" to authorize the Dawes Commission or the Secretary of the Interior to take away from more than a third of the freedmen the homes and property which the court after patient investigation had just given them.

The decree of the court and the roll made under it had been consented to and accepted by all the parties concerned, and the controversy was at an end. Surely it was not the purpose of Congress to unsettle these happy conditions.

We believe, on the contrary, that the true construction of this legislation of Congress was given by the learned judge who announced the opinion of the court below (Rec., p. 227):

> "We are bound to presume that the Kern-Clifton roll was made in compliance with the decree, because the decree was entered by consent, and because the Cherokee Nation and the beneficiaries whose names appeared on that roll entered into an agreement for distribution to be made under it. As a matter of fact, distribution was made under it, and there is nothing to show that the Kern-Clifton roll was ever questioned until the supplemental petition had been filed herein. If the payment by the Secretary of the Interior was a 'compliance' with the provision of the decree for the payment of money, the refusal of the Dawes Commission to allow these same persons to participate in the common property, as further provided in the decree, is not a 'strict' compliance, nor for that matter a compliance of any kind."

And further (Rec., p. 228):

> "The provisions of these two acts of Congress which follow the specific direction relating to freedmen are merely directory; that is, they relate to the duties of officers and not to the rights of parties. There is no

legislative intent apparent to take away the judicial ascertainment of legal rights of the parties and submit them to the future *ex parte* action of administrative officers. These provisions must be kept subordinate to the chief purpose of the statute and interpreted 'in strict compliance' with the preceding section and 'with the decree of the Court of Claims.' The Dawes Commission was not a judicial body. No party was sure of a hearing before it; its action was subject to the approval of an executive officer, and its legislative object was not to ascertain rights, but to assist individuals to obtain rights already existing. It was in legal effect a designation of administrative officers to do administrative work."

And finally (Rec., p. 234):

"In requiring the Dawes Commission to adhere strictly to the decree of this court in making a roll there is no indication that the appropriate remedy may not be invoked if it reasonably appears that there has been a departure from the directions of Congress. Certainly where two special jurisdictions appear to have been created by acts of Congress for special purposes, one of them possessing judicial power in a constitutional sense and the other not invested with that kind of power, it would seem that persons whose rights are affected should have the benefit of an investigation in the forum where the judicial investigation may be had. If there be a doubt as to the right of the Court of Claims to carry out the original and repeated intention of Congress respecting these freedmen, they should have the benefit of such doubt."

We therefore respectfully submit that the decree of the Court of Claims should be affirmed.

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